

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RICHARD LOID and GINGER LOID, a  
marital community,

Plaintiffs,

v.

COMPUTER SCIENCES CORPORATION, a  
Nevada corporation; HEIDI JARRETT;  
and JUSTINE JARRETT,

Defendants.

No. CV-12-5144-EFS

**ORDER GRANTING PLAINTIFFS' MOTION  
TO REMAND**

**I. INTRODUCTION**

This matter comes before the Court on Plaintiffs Richard and Ginger Loid's Motion to Remand, ECF No. 19. Defendants Computer Sciences Corporation ("CSC") and Heidi and Justine Jarrett (collectively, the "Jarrett Defendants") removed this case from Benton County Superior Court on November 2, 2012.<sup>1</sup> ECF No. 1. Although Plaintiffs and the Jarrett Defendants are all Washington residents, Defendants contend that the Jarrett Defendants were fraudulently

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<sup>1</sup> Because multiple parties share common surnames, the Court refers to Plaintiffs individually as Mr. Loid and Mrs. Loid, and to the Jarrett Defendants individually by their given names, Heidi and Justine. The Court intends no disrespect.

1 joined, and that complete diversity of citizenship otherwise exists  
2 between Plaintiffs and CSC.<sup>2</sup> *Id.* at 3-6.

3 Plaintiffs contest Defendants' assertion of fraudulent joinder.  
4 Plaintiffs seek leave to file an amended complaint,<sup>3</sup> which contains  
5 additional allegations and causes of action that Plaintiffs discovered  
6 after filing the initial complaint. Plaintiffs contend that they have  
7 stated (or at least can state) a valid claim against the Jarrett  
8 Defendants. Arguing that the Jarrett Defendants were properly joined,  
9 Plaintiffs ask the Court to remand this matter to the Benton County  
10 Superior Court. Having reviewed the pleadings filed in connection  
11 with this matter, the Court is fully informed and now enters the  
12 following Order.

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14 <sup>2</sup> In addition to asserting fraudulent joinder in the Notice of  
15 Removal, ECF No. 1, the Jarrett Defendants have also moved to  
16 dismiss the sole claim asserted against them in the Complaint,  
17 pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 5.  
18 The Jarrett Defendants' motion to dismiss was filed before  
19 Plaintiffs' motion to remand; however, the Court must address the  
20 motion to remand first. The motion to remand challenges the  
21 Court's subject-matter jurisdiction, and if the Court lacks  
22 jurisdiction, it lacks the ability to decide the motion to  
23 dismiss. *See, e.g., County of Nassau v. New York*, 724 F. Supp. 2d  
24 295, 300 (E.D.N.Y. 2010).

25 <sup>3</sup> Plaintiffs' motion for leave to file an amended complaint, ECF No.  
26 16, is also pending; however, if the Court grants Plaintiffs'  
motion to remand, the Court need not address (and, in fact, would  
lack jurisdiction to decide) Plaintiffs' motion for leave to file  
an amended complaint.



### III. DISCUSSION

#### A. Legal Standard

Under 28 U.S.C. § 1441, a defendant may timely remove a state-court action to federal court if the federal court in question has original jurisdiction over the dispute. However, "[i]t is to be presumed that a cause lies outside [the] limited jurisdiction [of the federal courts,] and the burden of establishing the contrary rests upon the party asserting jurisdiction.'" *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)) (alterations in original). The "strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper," *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam) (internal quotation marks omitted), and courts must resolve all ambiguity in favor of remand. See *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009).

Although removal of a diversity action under 28 U.S.C. § 1441(b) requires complete diversity of citizenship, see 28 U.S.C. §§ 1332(a), "one exception to the requirement for complete diversity is where [the] non-diverse defendant[s] ha[ve] been 'fraudulently joined.'" *Hunter*, 582 F.2d at 1043 (citing *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001)). Joinder is fraudulent "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). In such a case, the district court may ignore the

1 presence of the non-diverse defendant for the purpose of determining  
2 whether diversity of citizenship exists. *Morris*, 236 F.3d at 1067.

3       The burden for establishing fraudulent joinder is heavy, and it  
4 rests squarely on the party asserting fraudulent joinder. See *Green*  
5 *v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983); see also  
6 *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1170 n.3 (9th Cir. 2001)  
7 (concluding that "the party seeking to invoke federal jurisdiction has  
8 the burden of proving diversity jurisdiction"). "The removing party  
9 must prove that there is absolutely *no possibility* that the plaintiff  
10 will be able to establish a cause of action against the in-state  
11 defendant in state court, or that there has been outright fraud in the  
12 plaintiff's pleadings of jurisdictional facts." *Green*, 707 F.2d at  
13 205 (emphasis added). If "there is any possibility that a claim can  
14 be stated against the allegedly 'sham' defendant," remand is required.  
15 *Knutson v. Allis-Chalmers Corp.*, 358 F. Supp. 2d 983, 995 (D. Nev.  
16 2005) (citing *McCabe*, 811 F.2d at 1339).

#### 17 **B. Analysis**

18       The crux of the dispute over Plaintiffs' motion to remand is  
19 whether the Court may consider Plaintiffs' proposed amended complaint  
20 to determine whether the Jarrett Defendants were fraudulently joined.  
21 Defendants insist that jurisdiction (and therefore fraudulent joinder)  
22 is determined at the instant of removal; therefore, according to  
23 Defendants, subsequent amendments to the Complaint cannot defeat  
24 federal jurisdiction or give Plaintiffs a basis to seek remand.  
25 Plaintiffs, on the other hand, argue the Court must look outside the  
26 Complaint in weighing the question of fraudulent joinder. Plaintiffs

1 contend that the Court must remand the matter because Defendants  
2 cannot show – as they must, to justify this removal – that Plaintiffs  
3 are incapable of asserting a valid claim against the Jarrett  
4 Defendants. Plaintiffs assert that their proposed amended complaint  
5 provides sufficient basis to conclude that the Jarrett Defendants were  
6 properly joined.

7 Plaintiffs have the better argument. As discussed below, the  
8 Court may consider material extrinsic to the Complaint – including  
9 potential but as-yet-unpled claims – in determining whether the  
10 Jarrett Defendants were fraudulently joined. Further, Plaintiffs’  
11 proposed amended complaint contains at least one legally-cognizable  
12 cause of action against the Jarrett Defendants. Because the Jarrett  
13 Defendants were not fraudulently joined, the Court lacks subject-  
14 matter jurisdiction over this case, and a remand is required.

15 1. Consideration of Extrinsic Evidence in Determining  
16 Fraudulent Joinder

17 Other courts in this Circuit have relied on amended pleadings –  
18 or even the possibility of amended pleadings – in concluding that  
19 joinder of non-diverse defendants was not fraudulent. For example, in  
20 *Padilla v. AT&T Corp.*, a terminated employee brought suit in state  
21 court against a former employer and a worksite supervisor, alleging  
22 claims very similar to Plaintiffs’ claims here. 697 F. Supp. 2d 1156,  
23 1158 (C.D. Cal. 2009). Although the defendants removed the matter to  
24 federal court and argued that the supervisor, the only non-diverse  
25 defendant, was a “sham” defendant, the court disagreed. *Id.* at 1160.  
26 While noting the deficiencies of the plaintiff’s claims against the

1 former supervisor, the *Padilla* court concluded that "[e]ven if  
2 Plaintiff did not plead facts sufficient to state a claim against [the  
3 alleged sham defendant], Defendants have not established that  
4 Plaintiff could not amend her pleadings and ultimately recover against  
5 [that defendant]." *Id.* The *Padilla* court ultimately held that  
6 "[r]emand must be granted unless the defendant shows that the  
7 plaintiff would not be afforded leave to amend [the] complaint to cure  
8 the purported deficiency." *Id.* at 1159 (internal quotations and  
9 alterations omitted).

10 Generally, courts take a consistent approach when defendants  
11 remove and claim fraudulent joinder: they adopt a strong presumption  
12 in favor of remand and demonstrate a willingness to look beyond the  
13 face of the complaint. See, e.g., *Candy v. 474 Club LLC*, No. CV-06-  
14 400-S-EJL, 2007 WL 1381806 (D. Idaho Jan. 31, 2007); *Schuster v.*  
15 *Gardner*, 319 F. Supp. 2d 1159, 1163-64 (S.D. Cal. 2003). In *Candy v.*  
16 *474 Club LLC*, the district court concluded it could properly rely on  
17 an amended complaint, filed after removal, as a basis for rejecting  
18 the defendants' assertion of fraudulent joinder:

19 After reviewing the Plaintiff's original Complaint, the  
20 Court would agree with the Defendants that many of the  
21 asserted claims against the [non-diverse defendant] are  
22 [in-artfully] stated and ambiguous. . . . The Court could  
23 even agree that many of the claims fail to fully and  
24 completely articulate all the particulars of a given cause  
25 of action. But the Court cannot agree that *there is no*  
26 *possibility the Plaintiff can set forth a viable claim*  
27 *against [the non-diverse defendant].*

28 *Id.* at \*3 (emphasis added).

29 True, many courts have relied on new, extrinsic *facts* in support  
30 of preexisting claims – rather than the possibility of new *claims* – as

1 a basis for remand following fraudulent-joinder removals. But  
2 Defendants have not articulated a sound legal reason why evidence  
3 supporting new claims or causes of action should be treated  
4 differently than evidence supporting preexisting claims. "An overly  
5 mechanistic approach to . . . fraudulent joinder claim[s] is not  
6 appropriate," *Alderman v. Pitney Bowes Mgmt. Servs.*, 191 F. Supp. 2d  
7 1113, 1116 (N.D. Cal. 2002), particularly when the deficient pleadings  
8 can readily be cured. Defendants' effort to distinguish between  
9 extrinsic evidence in support of preexisting claims – as opposed to  
10 new claims – is, in short, a distinction without a difference.

11 Courts must conduct a deeper inquiry when considering whether  
12 the joinder of a non-diverse defendant is fraudulent. "The words  
13 'fraud' and 'sham' imply a degree of chicanery or deceit," *Padilla*,  
14 697 F. Supp. 2d 1156, 1160; in essence, fraudulent joinder is an  
15 intentional and wrongful effort by a plaintiff to prevent a defendant  
16 from exercising its statutory and otherwise-proper right of removal.  
17 This wrongful effort may not always be obvious within the four corners  
18 of the complaint. The Ninth Circuit has recognized that "[w]here  
19 fraudulent joinder is an issue, [the district court must] go somewhat  
20 further" in its inquiry, *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313,  
21 1318 (9th Cir. 1998), and cannot abandon that inquiry upon reaching  
22 the last page of the complaint. Characterizing a more searching  
23 inquiry as both "reasonable and necessary," the *Ritchey* court  
24 concluded that "[t]he defendant seeking removal . . . is entitled to  
25 present the facts showing the joinder to be fraudulent . . . [so as  
26 to] have the opportunity to show that the individuals joined in the



1 action cannot be liable *on any theory*." *Id.* (emphasis added). If  
2 defendants can resort to extrinsic material to justify their  
3 allegations of fraudulent joinder, surely plaintiffs are entitled to  
4 the same latitude to rebut such allegations. To hold otherwise is to  
5 elevate form over substance.

6 In any event, *Ritchey* reinforces two key principles that must  
7 guide fraudulent joinder removals. First, to avoid a subsequent  
8 remand, the removing defendants must show that non-diverse defendants  
9 cannot be liable to plaintiff *on any theory*, whether that theory is  
10 actually pled in the complaint or not. *Id.* Second, defendants – and  
11 so, for equity's sake, plaintiffs too – can result to sources of  
12 evidence extrinsic to the complaint to shed light on whether the  
13 joinder was fraudulent. *Id.*

14 Relying on *Williams v. Costco Wholesale Corporation*, 471 F.3d  
15 975, 976 (9th Cir. 2006), Defendants argue that the Court must  
16 consider only the Complaint – and no subsequent filings – to determine  
17 whether the Jarrett Defendants were fraudulently joined. Defendants'  
18 reliance on *Williams* is misplaced. In *Williams*, the Ninth Circuit  
19 reiterated the well-established rule that a plaintiff may not amend  
20 his complaint after removal to divest a federal court of jurisdiction.  
21 *Id.*; see also *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers,*  
22 *Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998). Observing that "the  
23 propriety of removal is determined solely on the basis of the  
24 pleadings filed in state court," the *Williams* court concluded that a  
25 plaintiff could not dispose of his federal claim after removal to  
26 eliminate federal jurisdiction and obtain a remand. But the facts in

1 *Williams* are readily distinguishable from the facts in this case.  
2 Here, Plaintiffs included the Jarrett Defendants in their initial  
3 Complaint, a pleading which does not facially give rise to federal  
4 subject-matter jurisdiction as the complaint in *Williams* did. And  
5 unlike the plaintiff in *Williams* – who amended his complaint to remove  
6 a federal statutory claim to divest the district court of jurisdiction  
7 – Plaintiffs here seek to assert newly-discovered claims against the  
8 Jarrett Defendants to bolster their *preexisting* contention that the  
9 Jarrett Defendants were properly joined in the first place. Thus,  
10 unlike the plaintiff in *Williams*, Plaintiffs here are not seeking to  
11 change the rules of the game while the parties are still on the field.

12 Contrary to Defendants' assertion, the Ninth Circuit has  
13 recognized limitations on *Sparta* and *Williams's* rule that district  
14 courts must ignore post-removal pleadings when deciding the propriety  
15 of removal. In fact, the Ninth Circuit has indicated that this  
16 pleadings-at-time-of-removal rule should apply only when the  
17 "existence of federal [subject-matter] jurisdiction [can be]  
18 determined from the face of the [state court] complaint," *Sparta*, 159  
19 F.3d at 1211, and "the amended complaint attempts to destroy federal  
20 jurisdiction after the case has been properly removed," *Chabner v.*  
21 *United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1046 n.3 (9th Cir.  
22 2000). But when the initial complaint facially precludes removal,  
23 courts may properly consider a timely-filed amended complaint "as a  
24 clarification to the allegations bearing on the federal court's  
25 jurisdiction." *Candy*, 2007 WL 1381806, at \*3 (citing *Schuster v.*  
26 *Gardner*, 319 F. Supp. 2d 1159, 1163-64 (S.D. Cal. 2003), and *Thornton*

1 v. *New York Life Ins. Co.*, 211 F.R.D. 606, 608-09 (N.D. Cal. 2002)).  
2 Accordingly, the Court concludes that it may consider the allegations  
3 and claims in Plaintiffs' proposed amended complaint, ECF No. 16, at  
4 4-11, to determine whether the Jarrett Defendants were fraudulently  
5 joined to this action.

6 2. Fraudulent Joinder of the Jarrett Defendants

7 Turning to the proposed amended complaint, Plaintiffs include  
8 factual allegations in support of a new defamation claim against the  
9 Jarrett Defendants. ECF No. 16, at 8-9. Plaintiffs contend that  
10 Justine removed romantic poems from Mr. Loid's desk, poems which Mr.  
11 Loid intended to give to Mrs. Loid. The amended complaint alleges  
12 that the Jarrett Defendants falsely represented to others that Mr.  
13 Loid gave these poems to Justine, and that the Jarrett Defendants made  
14 this false representation with the intent of bolstering Justine's  
15 false claim of sexual harassment against Mr. Loid. Plaintiffs contend  
16 this false representation – that Mr. Loid gave the poems to Justine –  
17 was "communicated . . . to others with malice . . . to effectuate [Mr.  
18 Loid's] termination" and to prevent Justine from herself being  
19 terminated. *Id.* at 9.

20 Defendants ask the Court to disregard Plaintiffs' defamation  
21 claim for purposes of determining fraudulent joinder. Defendants  
22 contend that Plaintiffs have failed to state a valid defamation claim  
23 against the Jarrett Defendants, and that this claim therefore does not  
24 affect the question of whether the Jarrett Defendants were  
25 fraudulently joined. ECF No. 26, at 8-9. Defendants identify three  
26 purported deficiencies with Plaintiffs' defamation claim: 1) the

1 amended complaint does not identify the specific defamatory statement;  
2 2) the statement was an intra-corporate communication, and therefore  
3 was not "published"; and 3) even if defamatory, the statement was  
4 protected by a common interest privilege. ECF No. 25, at 4-6.

5 The Court need not conduct a searching inquiry into the  
6 sufficiency of Plaintiffs' defamation claim to determine whether the  
7 Jarrett Defendants were fraudulently joined. "Claims for fraudulent  
8 joinder are reviewed on a standard similar to or more lenient than the  
9 standard for motions to dismiss." *Knutson*, 358 F. Supp. 2d at 995  
10 (citing *Sessions v. Chrysler Corp.*, 517 F.2d 759, 761 (9th Cir.  
11 1975)). After "evaluat[ing] all of the factual allegations in the  
12 light most favorable to the plaintiff" and resolving "any  
13 uncertainties as to the current state of controlling substantive  
14 law . . . in favor of plaintiff," *Bertrant v. Aventis Pasteur Labs.,*  
15 *Inc.*, 226 F. Supp. 2d 1206, 1212 (D. Ariz. 2002), the Court concludes  
16 that Defendants' position lacks merit.

17 Plaintiffs' proposed amended complaint sufficiently identifies  
18 the alleged defamatory statement: the Jarrett Defendants' assertion to  
19 others that Mr. Loid's romantic poems were given to and were intended  
20 for Justine. ECF No. 16, at 8. To the extent the amended complaint  
21 lacks some specificity, Plaintiffs' failure to set forth the precise  
22 defamatory statement, the recipient of the statement, or other details  
23 surrounding the alleged defamatory communication, is not material at  
24 this stage of the case. *Cf. Candy*, 2007 WL 1381806, at \*3 (holding  
25 that a plaintiff's failure to identify a specific false statement in  
26 pleading a fraud claim did not equate to fraudulent joinder because

1 the failure "does not satisfy [defendants'] burden of showing that  
2 there is no possibility the [p]laintiff will be able to adequately  
3 plead this cause of action" by way of an amended complaint).

4 Additionally, it is not clear that the intra-corporate  
5 communication exception shields the Jarrett Defendants from liability  
6 on Plaintiffs' defamation claim. The amended complaint avers that the  
7 defamatory statement was communicated to "others," without specifying  
8 who. ECF No. 16, at 9. If those "others" include persons who are not  
9 employees of CSC, the intra-corporate communication exception would  
10 likely not apply.

11 Moreover, under Washington law, both the intra-corporate  
12 communication exception and the common interest privilege are  
13 qualified, and can be defeated by a showing of actual malice. See,  
14 e.g., *Armijo v. Yakima HMA, LLC*, 868 F. Supp. 2d 1129, 1139 (E.D.  
15 Wash. 2012); *Bender v. Seattle*, 99 Wn. 2d 582, 601 (1983).  
16 Plaintiffs' amended complaint facially alleges such malice, see ECF  
17 No. 16, at 9, and Federal Rule of Civil Procedure 9(b) allows malice  
18 to be alleged in general terms. See *Armijo*, 868 F. Supp. 2d at 1139.  
19 Accordingly, for purposes of determining fraudulent joinder and  
20 diversity jurisdiction, Plaintiffs' amended complaint validly states a  
21 defamation claim against the Jarrett Defendants. The Jarrett  
22 Defendants were not fraudulent joined, and remand is necessary.

#### 23 IV. CONCLUSION

24 Plaintiffs have sufficiently identified a cognizable defamation  
25 claim against the Jarrett Defendants in the proposed amended  
26 complaint, which demonstrates that the Jarrett Defendants were not

1 fraudulently joined and must be considered in the diversity-  
2 jurisdiction calculus. Because the Jarrett Defendants, like  
3 Plaintiffs, are residents of Washington, complete diversity of  
4 citizenship is not present in this case, and the Court therefore lacks  
5 subject-matter jurisdiction under 28 U.S.C. § 1332. For that reason,  
6 the Court grants Plaintiffs' motion to remand, denies all other  
7 motions as moot, and remands this matter to the Benton County Superior  
8 Court for all further proceedings.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiffs' Motion to Remand, **ECF No. 19**, is **GRANTED**.

11 2. This matter is hereby **REMANDED** to the Benton County  
12 Superior Court (Cause No. 12-2-02353-8) for all further  
13 proceedings.

14 3. All other pending motions are **DENIED AS MOOT**.

15 4. The Clerk's Office is directed to **CLOSE** this file.

16 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
17 Order and provide copies to all counsel.

18 **DATED** this 5<sup>th</sup> day of March 2013.

19  
20 s/ Edward F. Shea  
EDWARD F. SHEA  
21 Senior United States District Judge  
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